

DECISION

MICHELLE LEE TENORIO, and
RAMON DELGADO, Appellants,

v.

OFFICE OF ECONOMIC DEVELOPMENT,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

Appellants appeal their layoffs from the Office of Economic Development (Agency), effective on June 30, 2017. The appeals were consolidated and a hearing concerning their layoffs was conducted by Bruce A. Plotkin, Hearing Officer, on February 8, 2017. The Appellants were represented by Sean Olson, Esq., while the Agency was represented by John Sauer, Assistant City Attorney. Appellants' exhibits A – P were admitted. Agency exhibits 1-8 were admitted. Each Appellant testified, and Appellants also called Denise Bryant, The Agency called Anita Davis, Rebecca Balu, Suzanne Iversen, and recalled Denise Bryant as a rebuttal witness.

II. ISSUES

The only issue presented for appeal was whether the Appellants' layoffs were arbitrary, capricious, or in violation of rule or law.

III. FINDINGS

Denise Bryant is the Workforce Services Director in the Agency. In that capacity she oversees the operations of the Workforce Development Unit (WDU), where both Appellants were employed.

The WDU pairs underserved employable citizens with private Denver employers. An important end goal of the WDU is to assist employable citizens to transition off public assistance by helping them to become more employable with employer-provided training or outright employment. In addition to assisting never-before-employed citizens, the WDU assists "dislocated" workers who lost jobs to industry departure, outsourcing, downsizing, or other forms of corporate efficiencies. In short, the goal of the WDU is to help the unemployed or underemployed obtain a self-sustaining wage.

Inversely, the WDU serves the Denver business community by expanding their talent acquisition pipeline, thus encouraging Denver businesses to remain in Denver. Those two goals – assisting the unemployed and assisting Denver businesses – remained the same before and after Appellants' layoffs.

Appellant Tenorio was the Workforce Center Operations Manager and was only one of three managers in the OED. In that role, she managed the supervisors of the three Workforce Centers (Westside, Montbello, and Speer/Elati) within the WDU and other staff including BDAs who oversaw

job-seeker and youth services, was responsible for preparing budgets, negotiating contracts, and managing relationships between the City and Federal Government. [Exh. 2; Bryant testimony].

BDA's interfaced with job-seekers and employers. Tenorio's position included oversight of the job-seeker side of WDU's operations, thus BDA subordinates under Tenorio met with and assisted job-seekers. When she was laid off, Tenorio had 21 years with the Agency.

Delgado was a BDA II who worked on the employer side of the equation under Tony Anderson, who was a Program Manager reporting to Anita Davis until the time of the layoff. Delgado met with employers in order to assess their needs so as to match job seekers with those needs. He also completed paperwork for various government wage subsidy programs that subsidized a portion of wages paid by employers who were willing to develop employees. BDA's who worked largely on the employer-side functions, specialized in a particular industry so that they could intelligently market OED's services to that industry. To that end, employer-side BDA's set up and conducted job fairs and on-the-job training programs, in which they informed prospective employers about wage-subsidy programs and other reasons to hire job-seekers through the OED.

In 2014, the Federal Government changed how it pays subsidies to employers who accept underserved employees and potential employees. Integral to that reform, WIA¹ became WIOA, the 2014 Workforce Innovation and Opportunities Act.² WIOA was enacted to acknowledge the changes in accountability for public assistance that took place over 20 years, particularly the development of "best practices" enabled by advancing technology. [Bryant testimony]. One best-practice in WIOA required a one-stop system to deliver job-seeker services, and required a competitive process to win that contract. [Exhibit 4]. Another best-practice required a separation of oversight and policy from administration and provision of services. Consequently, OED could no longer retain all those functions.

As a consequence of the new federal regulations, OED was obligated to change its structure. [Exhibit 2]. Denise Bryant, Director of Workforce Services in the Agency, led the development of two options for OED restructuring. She took the lead in presenting those options to the Mayor and implemented his selection of "Option 1." [Exhibit 5].

In accordance with the Mayor's decision, OED retained its overall goal - to match job-seekers with employers - but it eliminated every position in WDU, including those of Michelle Tenorio and Ramon Delgado. [See Exhibit 2 for then-current structure]. OED retained policy-making and interaction with employer-side functions under a substantially different structure, and many of the services previously performed by the WDU were transferred to ResCare Workforce Services (ResCare), a private vendor. [Exhibit 1; Bryant testimony; Balu testimony]. The new structure created new position titles and required former WDU employees to apply for the new positions. Of those former WDU employees who were hired into new positions, some continued to perform functions they had under the prior structure. Other functions, as required by the new federal legislation, were transferred to outside contractors. [Bryant testimony; Balu testimony]. BDA positions were entirely eliminated, including Delgado's.

One of Tenorio's former co-Managers, Anita Davis, applied for and obtained a position in the restructured Agency with a new working title, Assistant Director of Workforce Development. [Exh. 1]. Another lower-level supervisor who previously supervised Delgado, Tony Anderson, also applied for and received a higher-level position as the Business Services Manager, where he oversaw the new BDR positions, which retained a few of the previous BDA duties, as well as the Agency's Education Services Specialists. [Id.]

¹ Workforce Investment Act of 1998, 29 U.S.C. § 2801, *eq seq.*

² Workforce Innovation and Opportunity Act, 29 U.S.C. § 3101, *eq seq.*

As with their BDA predecessors, BDRs reach out to employers to develop relationships; and each BDR focuses on a particular industry sector, but now that responsibility stretches across the metro region. Their core function is tailored recruitment services and needs assessments from employers, and the BDR markets business development services to his/her sector. Also, unlike under the prior structure, the State now partly funds and drives sector development. That change, in turn requires a more global kind and quantity of analytics by BDRs compared to the BDAs. Accordingly, the work expectations (Program Enhancement Reports or PEPs) for BDRs have different outcome expectations than for BDAs. [Exhibit A; Exhibit B]. In contrast, Delgado's success was largely measured by the number of awards³ he was able to accomplish. [Compare Exhibit A; n. 4]. Delgado's other functions were transferred to a private contractor, ResCare; whose staff are not Career Service employees. [Bryant testimony; Balu testimony].

OED employees, including those in the WDU, are Career Service⁴ employees entitled to the protections of Career Service Rule 14-30 et seq., regarding the mandatory procedures governing layoff of Career Service employees. The layoff rules provide more protection to those employees with more years of service. [Bryant testimony; CSR 14-40 et seq.]. Delgado was a BDA for only four months at the time of his layoff, but had been a City employee for 24 years' total.

Laid-off BDAs, including Delgado, were permitted to compete for the new BDR positions. Three of Delgado's former BDA co-workers, Ken Arellano, Yohannes Mengistu, and James Roina were hired as BDRs after being laid off as BDAs. [Exh. 1]. Delgado applied, but was not hired.

Tenorio was a Manager in the Agency for 11 years at the time of her layoff, and had been a City employee for 21 years. She did not apply for a Manager 1 position in the reorganized Agency; however, she accepted a limited, one-year position as a Contract Administrator, offered to her by the Agency seven days after her layoff.

Appellants were served with notices of their layoffs on May 17, 2016, and the layoffs were effective June 30, 2016. [Exhibit N-230; Initial Appeal]. This appeal followed timely on June 1, 2016.

IV. ANALYSIS

A. Jurisdiction, Burden of Proof and Standard of Review

Jurisdiction to hear this appeal is granted under the Career Service Rules, CSR §19-10 A.1.e, as the appeal of Appellants' layoffs. I am required to conduct a de novo review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

In a layoff, the Appellants retain the burden of persuasion, throughout the case, to prove their layoffs were arbitrary, capricious or in violation of CSR 14-50 et seq. Dept. of Institutions v. Kinchen, 886 P.2d 700, 712 (Colo. 1994); see also In re Sanders, CSA 62-09 (9/24/2010).

B. Arbitrary Capricious or Violation of Rule or Law.

An administrative agency action, such as a layoff,⁵ is presumed valid unless it is arbitrary, capricious, or violates the law or the agency's rules. On the other hand, in our merit-based Career

³ An award is the funding through the Agency which is provided to employers who agree to hire candidates through Agency programs.

⁴ The Career Service Authority is the Denver's merit-based employment system, as required by its Charter, §. 9.1.1. It covers most City employees who are not in the Classified Service (Uniformed police and fire department personnel).

⁵ Discharge for job abolishment, as for reallocation, is an administrative, rather than a disciplinary action and thus does not involve credibility judgments arising from contested allegations of employee misconduct. Velasquez, at 542. Consequently, no due process violation

Service employment system established by the Denver City Charter, [Denver City Charter § 9.1.1], employees retain the right not to be displaced by the abolishment of a position they occupy when their position is replaced by a new position with substantially similar duties and responsibilities. In re Owens-Manis and Pettway, CSB 73-09, 75-09 (10/21/10), citing Velasquez v. Dept. of Higher Education, 93 P.3d 540 (Colo. App. 2003). In re Sanders, CSB 62-09 (2/17/11). Thus, the beginning point in discussing Appellants' appeal of their layoffs is whether the duties and responsibilities of new positions created by the Agency are substantially similar to the positions from which they were laid off.

DELGADO

I. Whether BDRs are substantially similar to BDAs.

Delgado argued the new BDR positions were the same or highly similar to his former BDA position, specifying his duties of marketing to employers, and specializing in a particular industry, healthcare. He argued the manner in which former BDAs were transformed into the new BDR positions did not follow the procedures set forth in CSR 14-40 *et seq.* [now CSR 14-50 *et seq.*].

In support of his theory, Appellant argued that about 50% of the job duties James Roina performed as a BDR were originally performed by BDAs. He cited his BDA PEP and Roina's BDR PEP in support of his argument. [Exh. A; Exh. B].

Bryant responded the majority of the BDA's job duties were transferred to the private sector at ResCare, with only around 10% of the duties previously performed by BDAs being overseen by the new BDRs. In estimating that percent, Bryant analyzed functions that substantially differed, including:

(1) the BDR position entails more strategic planning, while BDAs were more process-oriented, which Bryant described as making sure the boxes were checked, for example making sure agreements were signed, whether background checks were performed, what award amount would convince an employer to hire candidates, and signing contracts with employers. [Bryant cross-exam at 10:18:57, 10:31:13].

2) Bryant acknowledged BDAs developed relationships with employers as do BDRs, but BDAs did so only as the end-product of a strategic plan they were not involved in. [Bryant cross-exam].

(3) Each BDA focused on a particular employer-side sector as do BDRs, but BDRs now act strategically and analytically in that relationship, and are required to specialize in an industry, rather than merely being encouraged to do so. For example, former BDA Roina has a focus in the construction sector, but, as opposed to former BDAs, his duties are about alignment and strategy to ensure those employers will have a predictable pipeline of candidates. [Bryant cross-exam @ 10:19:40]. Thus, Roena not only seeks out potential employers in the construction sector, but makes recommendations that drive policy in the OED, functions which no BDAs performed.

(4) BDR performance evaluations, unlike those of former BDAs, are not measured by the number of awards granted.⁶

arises even when, rules or law, such as in our Career Service merit system, entitle a laid-off employee to a hearing, but places the burden of proof on the employee. Velasquez at 543, citing Hughes v. dept. of Higher Educ., 934 P.2d 891 (Colo. App. 1997), *overruled on other grounds*, Lawley v. Dept. Higher Educ., 36 P.3d 1239 (Colo. 2001); CSR 19-10 A.1.e.

⁶ ResCare employees who were former BDAs, such as Richard Marr, are evaluated based on awards granted, however ResCare is a private entity, thus its employees' evaluations cannot be compared with those under the Career Service.

(5) Performance measures for the two positions are substantially different. [Compare Exhibit A with Exhibit B; Bryant cross-exam].

In addition to those differences, when asked if anyone in OED currently performs the same duties Delgado performed, Bryant answered bluntly “no.” She explained most of the duties of Delgado’s position were assumed by ResCare, and that no Career Service employees now operate one-stop centers as did BDAs. As an example, Bryant identified Richard Marr, a former BDA, is now with ResCare and has most of the duties and responsibilities of the former BDAs. She said there are other employees at ResCare who also perform the former duties of BDAs. [Bryant cross-exam]. Davis echoed Bryant’s testimony, stating she used to supervise five BDAs and that in her current role she is also familiar with the duties of BDRs. Davis stated 70-80% of BDA duties were assumed by ResCare. [Davis testimony].

Responding to Delgado’s PEP claim (50% shared duties), Bryant responded the year the BDR PEP was created was a transitional year, and the current PEP shows increasing dissimilarities due to a reassessment of how the duties of the BDR are weighted. [Bryant testimony]. Moreover, 50% of similar duties do not, per se, establish the positions were the same or highly similar.

Tenorio attempted to rebut the Agency’s “transitional PEP” argument, by arguing she had never seen anything called a transitional PEP in her 21 years; however, it is common sense the reorganization of an entire Agency made it likely duties would change somewhat as adjustments to a new structure were made. Moreover, Tenorio acknowledged PEPs can and do change year-to-year with the needs of the Agency. [Tenorio testimony].

The PEP for Delgado’s former BDA position and the PEP for Roina’s BDR position share these similarities: general customer service, interacting with colleagues and the public in a professional manner, and marketing workforce development services to industry representatives. [Exh. A; Exh. B].

Differences between the positions are notable. BDA’s had more “granular” duties, according to Bryant, which involved selling a specific amount of workforce development services to employers, matching a specific number of customers to awards and programs, and retaining a high number of customers in the overall program. [Delgado testimony, Davis testimony, Bryant testimony; Exh. A]. BDRs, on the other hand, did not have such specific metrics, and instead are focused almost entirely on industry outreach and sector partnerships to employers, as well as coordinating services across OED and assisting with the “Jump Start” and youth outreach programs. [Exh. B].

Although Delgado was a member of an industry partnership, an unenforced expectation of BDAs, he was not a member of an industry association, as is required for BDRs. [Davis testimony; Delgado testimony]. Further, although BDAs had some program management roles, it was not a central focus on the job, and did not require making formal recommendations to higher-level management. [Exh. B]. The Youth Services program, a part of BDA duties, was transferred to BDRs and is now a central function of BDRs. Job Fair functions were transferred to ResCare, and despite being temporarily shifted back to BDRs, will ultimately end up there. [Delgado testimony, Davis testimony, Bryant testimony; Exh. 1; Exh. B].

In summary, the BDA position was largely employee focused, and was measured on the number of awards given to job-seekers and employers as well as the retention rate for job-seekers, while the BDR position did not have specific quantitative goals, and instead was more policy-focused on the employer side. [Exh. A; Exh. B; Bryant testimony; Davis testimony]. Based upon these circumstances and findings, Delgado failed to establish, by a preponderance of the

evidence, that the Agency's newly-created BDR position was substantially similar to the BDR position from which he was laid off.

II. Whether the hiring of Arellano, Roina, and Mengistu, instead of Delgado, violated CSR 14.

In addition to his "substantially similar" argument, Delgado also claimed the Agency failed to comply with the mandatory layoff process pursuant to CSR 14. After Delgado was laid off, he applied for but was not hired as a BDR. Appellant was told he was not selected because he did not perform well in the interview. He acknowledged he did not perform well in the interview. [Delgado testimony]. Ken Arellano, James Roina, and Yohannes Mengistu, also former BDAs, were hired as BDRs.

Delgado was a BDA for only four months before his layoff, but had been a Program Administrator following an audit of his position, and has been employed by the City for 24 years. As such, he would be placed in a more protected layoff group under the layoff rules than someone with fewer years of service. Delgado noted he had more than twice the years of service compared with any of the three who were re-hired as BDRs. [Exhibit 8-10; 8-9; 8-4]. Delgado claimed this discrepancy violated the order of layoffs according to seniority conferred by CSR 14-42 and 14-44.

The Agency correctly reasoned that, under CSR 14, the order of layoff according to seniority pertains only to downward bumping rights, i.e. a more senior employee has the right to take the remaining position of a less-senior employee. Since the entire Agency was laid off, there remained no less-senior position for Delgado, or anyone else, to bump into.⁷ BDA positions were entirely eliminated making it irrelevant to which layoff group each of the above-named employees was assigned, since seniority pertains only to bumping rights. CSR 14-42 *et seq.* In addition, BDR responsibilities differed from those of BDAs, according to the Agency. [Bryant testimony; Davis testimony; Exh. A; Exh. B]. Based on the above findings, Delgado did not establish the Agency failed to comply with CSR 14 in its layoff of BDAs or hiring of BDRs.

TENORIO

Before addressing whether the positions cited by Tenorio were substantially similar to her former position, or whether the new positions were filled improperly under CSR 14, the evidence presented indicates Tenorio lacks standing for her claims. Bryant testified credibly that Tenorio did not apply for either Manager position after the reorganization, and Tenorio did not claim she did. As such, she has no more right to claim the appointments were improper than any other non-applicant. Even assuming Tenorio had standing, her claims would fail based upon the following evidence.

I. Whether Davis' and Anderson's manager positions are substantially similar to Tenorio's former manager position.

Tenorio claimed Davis' position retains about 85% of the duties she (Tenorio) performed as Manager, including oversight of the same programs as before, monitoring budgets for those programs, attending community, board, and directors' meetings as well as City Council meetings, and attending conferences.

⁷ Of course an employee may argue, as Delgado and Tenorio do here, that, even if all employees are laid off, leaving no inferior positions under the bumping rules, the same position was substantially (and therefore unlawfully) re-created elsewhere. [In re Sanders, CSA 62-09, 4-5 (9/24/2010)]. That is a separate argument addressed elsewhere in this Decision.

Most of the core functions of Tenorio's position were taken over by Rebecca Balu, a Rescare employee. Tenorio acknowledged a core function of her former position was overseeing supervisors who ran the one-stop centers, [Tenorio testimony; Exh. 2], and that function was transferred to the private sector.

Tony Anderson, was a Program Manager in the Agency before the reorganization. After his layoff, he obtained a higher-level position, Business Services Manager (BSM), in the reorganized Agency. Bryant described that position as equivalent to Tenorio's former position, but not the same job. As a BSM, Anderson oversees the BDRs, who retained some of the employer-oriented duties previously assigned to BDAs, as well as the Education Services specialists they are partnered with. [Exh. 1].

Bryant claimed Davis' new position shares only 15% with Tenorio's previous position. [Bryant testimony]. Davis also claimed only 10-12% of her current duties remain similar to those previously managed by Tenorio. Bryant stated there is no overlap between Anderson's position and Tenorio's. Tenorio disagreed. She claimed approximately 85% of Davis' duties are those she performed, and that many of the duties assigned to Anderson are the same as those she previously performed. [Tenorio testimony].

A comparison of the PEPRs Tenorio's previous position and Davis' current position indicates some similarity. [compare Exh. E; Exh. F]. The PEPRs sections titled "Human Resources Management" and the various subcategories of "Information Management" are nearly identical, and are weighed in a similar manner. [Id.]

The Agency, through Bryant and Davis, acknowledged Davis and Tenorio's positions shared some similar roles including managing a budget and staff, typical duties assigned to most managers across the City. However, despite the superficial PEP outcome similarities, there were also significant differences in the actual role. For example, Tenorio was previously responsible for a budget of \$4 million, while Davis manages a \$16 million budget, which includes the budget formerly assigned to the other managers.

Further, although both jobs involved general management duties, the type of management differs because Davis manages specialists from across the agency, and Tenorio directly managed only the people who supervised the one-stop centers and the youth services division. [Exh. 1, Exh. 2]. Also, although Tenorio testified she used to present reports to the Workforce Development Board and the Mayor, that role was minimal. Tenorio described her involvement as mostly "attended" those meetings. In contrast, Davis is often the point person for the Agency when presenting to the Mayor or City Council.

In addition, Davis must continuously analyze the delivery of services in her budget, a duty that did not exist before the reorganization. Tenorio projected targets for funding organizations, but Davis must also predict and analyze what "deliverables" will be required, and must create and implement tracking mechanisms to measure the degree of success of her projections, also duties that did not exist before the reorganization.

Davis also has a significant role in oversight and policy. She oversees a fulltime policy liaison, with respect to compliance with federal and state regulations. She also helps develop and oversee procedures to align with those of the new partners of the reorganized Agency. These differences demonstrate Davis' Manager position and that formerly occupied by Tenorio are not substantially similar.

Finally, Davis at one time held Tenorio's position, and Davis testified credibly almost all the duties in that position were assumed by Balu in ResCare, a sentiment echoed by Ms. Balu.

[Davis testimony; Balu testimony]. Balu also testified Davis has "a lot" more responsibilities than Tenorio used to have.

As to the degree of similarity between Anderson's position and that held by Tenorio, both shared core management duties such as: managing staff, developing relationships, and reporting information up the chain of command. [Tenorio testimony; Davis testimony; Bryant testimony]. However, Anderson does not oversee one-stop centers, does not oversee contractors, nor does he create or manage budgets. [Davis testimony]. Instead, Anderson oversees the BDR positions and the Education Specialists with whom they are paired toward the end of creating and maintaining a talent pipeline for the industries. [Davis testimony; Bryant testimony].

Tenorio claimed she performed the following duties in common with Anderson: addressing City Council "when appropriate," directing policy, and conferring with the other Managers. [Tenorio testimony]. A more detailed analysis of similarities between Anderson and Tenorio's positions is impossible, as neither party provided Anderson's PEP. However, the aforementioned similarities, along with other commonly-shared management duties such as management of subordinate staff, are not sufficient to indicate the two positions are substantially similar.

II. Whether the hiring of Anderson and Davis, over Tenorio, violated CSR 14.

Tenorio argued that by not placing her in a Manager position in the reorganized OED, and instead promoting Anderson and retaining Davis, the Agency violated CSR 14-42 *et seq.* She argued she had 21 years of service, which placed her into layoff group D, the highest group. Anderson had fewer than five years' experience, and would have been in layoff group A.

The same analysis that applied to Delgado, above applies here. The placement of incumbents into layoff groups became immaterial since every position was eliminated, leaving no bumping rights to any incumbent. Tenorio failed to establish that the Agency's appointment of Anderson or Davis violated CSR 14. She also failed to establish the positions occupied by those incumbents are substantially similar to the position from which she was laid off.

For the reasons stated above, Appellants failed to establish, by a preponderance of the evidence, that their layoffs were arbitrary, capricious, or contrary to rule or law. Consequently, the Agency's layoff must be sustained.

V. ORDER

The Agency's layoff of the Appellants, effective on June 30, 2016, is AFFIRMED.

DONE March 31, 2017.



Bruce A. Plotkin
Career Service Board Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 et seq. within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.

I certify that, on March 31, 2017, I emailed a correct copy of this Order to the following:

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A handwritten signature in black ink that reads "Laura Hammock". The signature is written in a cursive style with a large, stylized initial "L".
